STATEMENT OF THE CASE.

This case was commenced by a libel *in rem* against the steamship "Southwark" in the United States District Court for the Eastern District of Pennsylvania, to recover damages for the rotting of a quantity of dressed meat while being carried by the steamship from Philadelphia to Liverpool. The meat was shipped by Martin, Fuller & Company, the libellants, who are wholesale meat merchants at Philadelphia, and was required to be kept chilled while in transit. The libel alleges that the "Southwark" is one of the vessels of the American Line, regularly engaged as a common carrier for hire, in transporting fresh meat across the ocean, and was fitted with "refrigerating apparatus and compartments, specially constructed, wherein a greatly reduced temperature is maintained, in order to carry fresh meat safely;" that the libellants had knowledge thereof, and therefore delivered to the steamship, July 3, 1894, 961 quarters of fresh beef, and paid the freight thereon in advance, $1531.26; but that at the time the "Southwark" sailed from Philadelphia, the refrigerating apparatus "*was out of order and was working badly*," and was not able to sufficiently reduce the temperature in the compartments where the meat was stowed.

2.

The meat was shipped under a bill of lading (Record, p. 9) acknowledging its receipt "in apparent good order and condition" and undertaking its delivery "in like good order and condition at the port of Liverpool." The bill contained the following clause:

> "It is expressly agreed that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay or damage thereto however arising, including

stowage and all risks of breakdown or injury however caused, either to its refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage; also that in case of the meat becoming, from any cause in the opinion of the master of the vessel, putrid, dangerous or offensive to the passengers or crew, it may be thrown overboard or otherwise disposed of, without liability to the carrier for consequent loss."

Upon the arrival of the steamship at Liverpool the meat was "in very bad condition, mouldy and slimy" (Record p. 20), and out of 961 quarters shipped, but 111 quarters could be sold at Liverpool, and the price realized therefor was about three half pence per pound. The rest of the beef was sent to London and the total loss of the libellants was $6,036.

3.

The answer sets up the clause in the bill of lading above referred to, as a defense; denies that the refrigerating apparatus was out of order; and alleges:

> "On the contrary, the steamship "Southwark" left the port of Philadelphia with the refrigerating apparatus in perfect order and after due inspection, and all necessary repairs were duly and promptly made while on the voyage."

The answer further alleges that:

> "*At the beginning of the voyage*, through some cause not known to the respondent, but not connected with any defect in the machinery at the time of leaving port, the refrigerator machinery broke down and had to be repaired."

4.

At the time the cargo of meat was received on board the "Southwark," the temperature in the meat compartment was abnormally high—about 42°. This was due to the high temperature of the brine circulating around the meat compartment,

and which was the vehicle by which the compartment was chilled. The temperature of the compartment must be below the freezing point to preserve the meat (it is usually not higher than 30°), and in order to keep the air at that temperature, the brine must be even lower, and is usually maintained at about 20°. But instead of that, the brine temperature was 40°, at least 20° above what it should have been. As brine, when once cooled, retains its temperature for a long time, it is clear that it never was sufficiently chilled, although the machinery had been working for at least forty-eight hours prior to the receipt of the cargo, and if in proper working order, the temperature of the brine would have been reduced to about 15° during that time.

Although these conditions demonstrated that the refrigerating machinery was not in efficient condition and was not creating a sufficiently low temperature to preserve the meat, yet without the slightest examination of the machinery to ascertain the cause of its inefficiency, the libellants' cargo of fresh meat was taken on board and the steamship proceeded on her voyage in midsummer weather.

With these existing conditions, the subsequent occurrences could easily have been foreseen. The refrigerating machinery broke down an hour or two after the ship left the dock. Instead of returning, repairs were attempted. When they were completed and the machinery was again started, a more serious breakdown occurred. Repairs were again made, and although finally completed in about two days, the temperature was never reduced to the freezing point until the very last day of the voyage. When the meat was taken out the greater part of it was rotten.

5.

From the nature of the case, the libellants were unable to produce detailed testimony as to the *exact cause* of the breakdowns of the machinery. There will be found however, upon p. 204 of the Record, a copy of the Refrigerator Log of the "Southwark" for the voyage in question, and there

will also be found, upon p. 206-7, a report made by the Chief Engineer of the "Southwark" to the Superintending Engineer, after the arrival of the steamship at Liverpool. The log and report were produced by the respondent at the call of the libellants, and from these reports, the libellants have shown by the testimony of a number of experts, that **the refrigerating apparatus was not working properly when the "Southwark" sailed upon her voyage.** The *exact cause* of the breakdowns is, therefore, immaterial.

The testimony in behalf of the respondent admits the successive breakages of the machinery, which the libellants allege, but contends that the apparatus had been "inspected" before the vessel left port, and that the engineer of the "Southwark" can assign no definite reason for the accident.

6.

The case was heard upon libel, answer, and proofs, and the learned Judge of the District Court dismissed the libel for the following reason, (Record, p. 209):

> "I see no sufficient evidence of negligence on the part of the vessel, either in supplying unsuitable machinery or in failing to inspect properly, or in improper management (whatever the scope of the word management may be) and without proof of negligence on the part of the ship, the libellants' case must fall."

His opinion may be found also in 104 Fed. Rep. 103.

The libellants appealed to the United States Circuit Court of Appeals for the Third Circuit, but the decision of the District Court was affirmed, in an opinion which held that the rotting of the meat, had not been shown to be due to the carrier's *negligence*, and that the burden was upon the libellants to *prove* such negligence, notwithstanding the fact that the proofs showed that the refrigerating apparatus was not working properly when the ship left port and the *answer* itself admitted that the breakdowns of the machinery were "*at the beginning of the voyage.*"

The opinion may be found at p. 213 of the Record, and is reported in 108 Fed. Rep., p. 880.

The case is brought to the Supreme Court on a writ of *certiorari*.

ASSIGNMENTS OF ERROR.

1. The learned Judge of the District Court (whose decision was adopted by the Circuit Court of Appeals) erred in not finding that the refrigerating apparatus was in an unfit condition and working improperly at the commencement of the voyage, and that the rotting of the meat was due to the respondent's negligence.

2. In holding that the "dressed meat clause" of the bill of lading abrogated entirely all warranty of the initial fitness of the ship to receive the cargo, and of the refrigerating machinery to preserve it.

3. In not holding that the Harter Act applied to a contract to carry fresh meat.

4. In holding that the burden of proof was upon the cargo owner to show that the loss occurred through negligence, and in not holding that under the circumstances of this case, the burden was *shifted* to respondent.

5. In holding, in effect, that the superficial observation of machinery in motion, by one who had no duty of inspection, and who failed to discover its patent unfit condition, was a proper inspection and the exercise of "due diligence."

Finally, in entering a decree dismissing the libel.

ARGUMENT.

The carriage of fresh meat across the sea is now a common trade (Record p. 14). While a comparatively new business it is of great value. Several Trans-Atlantic lines are engaged in the business and an authoritative decision by this Court determining their duties and obligations is especially desirable.

In order that cargoes of fresh meat can be safely kept during the transit, and delivered in good condition, it is necessary that the temperature of the compartment where they are stowed be maintained *below* the freezing point. The general practice is to reduce the temperature to at least 30 degrees. Ordinary skill merely is required to see that the apparatus is in good order (Record 15).

The "Southwark" was supplied with two refrigerating machines; one, a single machine, used for cooling the compartment where the ship's provisions were stored, and which is referred to as the "ship's box," or the "provision box"; and the other, a much larger machine, used for cooling the compartment where cargoes of fresh meats were stored and which is referred to as the "commercial box".

Both of these machines were of the compression type, using anhydrous ammonia gas as the refrigerating agent, brine as the circulating medium, and were of the Kilburn manufacture.

The ship's machine, and the commercial machine could be used interchangeably upon either box, by a series of pipes which connected them.

The process of refrigeration by compression machines is so concisely and so well described in *Wallis-Tayler on Refrigerating and Ice Making Machinery*, that counsel feel justified in inserting the following extract from that work. Upon p. 22, it is said:

"Whatever the refrigerating or heat-absorbing agent

that may be used, the following cycle of operations is obligatory in all machines working upon this principle, viz. :

"First, compression, that is the refrigerating or heat-absorbing agent in gaseous form, is subjected to a pressure sufficient to reduce it to a liquid form, the said pressure varying with the nature of the agent, and the temperature of the condensing water. During this compression, a degree of heat is developed in accordance with the amount of pressure to which the gas is subjected, or to the volume to which it has to be reduced relatively to that of the gas, in order to produce liquefaction. The heat is carried off my means of condensing or cooling water.

"Second, condensation, during which process the heat developed during the above-described compression of the gas is carried away by forcing the latter through water-cooled pipes, the heat being transferred to the said cooling water. At this point the gas is ready to assume the liquid form, in doing which an additional amount of heat is given off to the said water.

"Third, expansion, during which the liquefied gas is admitted to a series of coils of pipes, and being suddenly relieved of pressure, instantly flashes or expands into a gaseous form, in doing which, according to the above-mentioned law of physics, it is forced to absorb or take up a quantity of heat which it renders latent, and which it draws from the surrounding objects, viz., firstly, of course, the pipes or coil wherein it is confined, and secondly, such substance as may be brought in contact with the latter, and which it is desired to cool, as air, water, brine, &c.

"The amount of heat thus abstracted or absorbed is equal to that previously given up to the cooling water in the condenser, the gas being then ready for compression, &c., and the cycle of operations can thus be repeated *ad infinitum*.

"These three operations being essential, all machines of this class, however much they may differ in more or less important points of detail, must perforce consist of the following three series of parts, viz. :

"First, a compression side, wherein the gas is compressed in some suitable and convenient manner.

"Second, a condensing side, wherein the gas circulates through water-cooled pipes or coils, or their equivalent, gives off its heat, and liquefaction takes place.

"Third, an expansion side, consisting of pipes or coils, or other space, wherein the gas can re-expand and perform its work of cooling or refrigerating by extracting heat in the above-described manner from the surrounding objects."

For the purpose of artificially cooling the compartment in which meats are carried, a fourth act is necessary; that is, the *circulation* of the brine through a series of pipes which pass through the refrigerator and surround the meat compartment. As the brine circulates it absorbs the heat from the compartment and delivers that heat to the ammonia in the refrigerator, and again circulates through the pipes.

The process in short is as follows:

1. The compression of the ammonia.
2. Its condensation.
3. Its expansion in proximity to brine.
4. Circulation of the brine to the commercial room.

The brine in no way acts as an agent in producing the cold, but is simply a vehicle by which the cold produced by the expansion of the condensed ammonia, is carried through tubes to the commercial room, and there absorbs the heat and reduces the temperature of the room.

The first effect of the apparatus when its operation is begun, is to compress the ammonia, condense the same, and then reduce the temperature of the brine, and if there is anything the matter with the machine, the first effect of the trouble *is apparent in its failure to properly lower the temperature of the brine.*

Hence, as the brine is merely the vehicle to transport the cold to the commercial room, a failure to reduce the temperature of the brine to a sufficient degree, certainly and of

course, fails to reduce the temperature of the commercial room.

Brine is used as the carrying agent for the cold, because *when once chilled it remains cold for a long time*, and if any stoppage of the machinery is necessary, the brine, still retaining its cold, prevents the temperature of the commercial room from at once rising to the danger point.

With this brief explanation of the operation of the ammonia compression machine, let us look at the evidence. The essential facts are admitted. The dispute is as to the inferences to be drawn therefrom.

At the beginning of its consideration, counsel desire to call the attention of the court, to what seems to be an entire misapprehension on the part of the learned Judge of the District Court, of the basis of the libellants' action, and the ground upon which they contend that the respondent should be held liable.

It is said in the opinion of the District Court (Record, p. 211):

> "No doubt the machinery, for some reason or reasons, did not do its work, and no doubt, also, its failure to reduce the temperature sufficiently *was due to the several breakdowns*, but I cannot discover sufficient evidence to satisfy my mind *that the vessel was to blame for the accidents.*"

The learned Judge certainly assumed that the libellants contended:

1. That the rotting of the meat was due to the *breakdowns;* and

2. That the *breakdowns* were caused by negligence.

The libellants did not so contend in the District Court nor do they do so now.

They charge:

I. That the refrigerating apparatus was working improp-

erly *before* these accidents, and that the rotting of the meat was due to the high temperature in the commercial box, *at the time the meat was received*, and *at the time the ship sailed*, and that respondent was negligent in *receiving* libellants' meat under such conditions.

II. That with respect to the actual *breakdowns* which occurred "*at the beginning of the voyage*," as the answer alleges (Record, p. 109), or an hour or two *after* the vessel sailed, libellants simply contend that these breakdowns are *evidence* that the machinery was working improperly when the meat was received, and with the other evidence in the case *shift* the burden of proof upon respondent.

The opinion of the Circuit Court of Appeals is principally directed to a discussion as to whether the Judge of the District Court had overlooked the libellants' contention or not, and does not discuss the facts or law by reason of which that contention is disposed of.

It concludes:

> "His opinion * * * sufficiently states the facts and rightly rules the law."

Bearing in mind this explanation as to the basis of the libellants' case, the errors into which the courts below fell, will be avoided.

To repeat, then, the libellants assert that the refrigerating machinery was in an unfit condition and working improperly *at the time the meat was received and the vessel sailed.* That assertion is based upon the undisputed facts, that although the machinery had been at work for ample time and under suitable conditions, yet it had failed to reduce the temperature of the brine to a proper degree. The temperature of the brine, and consequently of the meat compartment, at the time the meat was received, was so abnormally high, that the meat should not have been placed in the meat compartment.

Libellants called as their chief witnesses to the insufficient

result produced by the refrigerating apparatus, three experts entirely familiar with refrigerating machines, and they all testify **that the temperature of the brine itself must be reduced much lower than the temperature of the commercial box, and that any insufficiency of the machine to work effectively, is first seen by its failure to sufficiently chill the brine.**

The Refrigerator Log of the "Southwark" (Record, page 204), shows that on July 4th, the day the vessel sailed, and upon the 5th and 6th, the temperature of the *brine* (third column of the log) was but 40°, and the temperatures of the commercial rooms, at the same time, July 4th, when the vessel sailed, and upon the 5th and 6th, was but 42°. Now it cannot be denied that in order to carry fresh meat in safety upon a voyage across the ocean, the temperature of the commercial room **must be below 32°**, and as the brine is merely the means by which the cold is imparted to the commercial room, **the temperature of the brine must be manifestly much below 32°, in order to reduce to that extent, the temperature of the room.**

FIRST POINT.

The Refrigerating Apparatus was in an unfit condition and was not working properly at the commencement of the voyage.

This is proved by the following facts :

1. It had failed to reduce the temperature of the *brine* and commercial room to a proper degree.

2. The ship's own box, for her own meat supplies, had been sufficiently chilled at the same time, and under the same circumstances, and carried its contents safely, and this notwithstanding the fact that when the breakdowns occurred to the refrigerating machinery of the commercial room, the smaller machine of the provision box was put to work on the commercial room as well as the provision box.

3. A series of breakdowns began an hour or two after the vessel sailed.

4. After these breakdowns had been completely repaired during the voyage, the machine was still unable to reduce the temperature of the brine or commercial room to the proper degree.

I.

WHAT SHOULD BE THE TEMPERATURE OF THE BRINE AND COMMERCIAL ROOM WHEN THE MEAT IS RECEIVED.

The evidence in behalf of the libellants is practically the only evidence in the case, but the learned Courts below either failed to consider it, or failed to comprehend its force and effect. It seems clear that the brine should have been down to about 20° and the room below freezing.

HUGO B. ROELKER, the first witness called by the libellants upon this point, is a mechanical engineer, engaged for 20 years in the manufacture and care of refrigerating machinery and familiar with the machines in use on transatlantic vessels. He says (Record p. 27), that **the temperature of the brine should be about 15°.**

> "*Q.* Suppose the temperature of the brine flowing into the cold room at the time of the sailing of the vessel was 40 degrees, please state whether or not in your opinion the temperature of the brine was as low as it should have been, or whether it was a proper temperature?
>
> "*A.* **It was a very improper temperature;** the temperature should have been down to about 15 degrees.
>
> "*Q.* What does that temperature indicate so far as the working of the machine is concerned, if anything?
>
> "*A.* That the machine had produced very little cold, if it had worked from 24 to 48 hours on the brine, as was stated before. * * * I should judge from this temperature that it worked at a good deal less than half of its proper capacity."

AUGUST J. ROSSI, the next witness called upon this point, is a consulting engineer, concerned exclusively for years with refrigerating machines, and indeed, the inventor and patentee of one. He has constructed himself a great many machines of various capacities. He says the temperature of the brine should not be higher than 20°. (Record p. 38.)

"*Q.* Assuming that the temperature of the brine which is flowing from the refrigerator into the meat room on the day the vessel sailed was 40 degrees, please state whether or not, in your opinion, that was a proper temperature for the brine to have been?

"*A.* For the inflowing brine? Not at all. The practice is to have a temperature of 20 degrees in the inflowing brine and 25 to 26 degrees coming back to the refrigerator to be cooled again; and that corresponds to the temperature of the room of about 34 to 35 degrees."

And upon page 39 he continues:

"Forty degrees in the brine, in any case, the temperature of the liquid coming into the room in order to cool the contents of the box, was considerably too high, since when you want to cool anything, meat, or any substance whatever it may be, the temperature must be so low in the room as to admit an exchange of temperature between the object that you put in the box and the air of the room."

He was then asked what a temperature of 40 degrees in the brine indicated, and he replied:

"**It shows that the machine was not working in proper order in order to take care of the meat room;** that is to say, that you could not expect, with such a temperature of the brine, to keep the room and the contents of the room in general at the proper temperature. It was considerably too high."

WILFRED H. FLEMING, also called by the libellants upon this point, is a mechanical engineer and special surveyor of refrigerating apparatus for underwriters. He is a man of

large experience, and during the past two years made over 90 surveys of refrigerating machines upon steamships in Baltimore, Philadelphia, New York, Boston and Portland.

Upon Record p. 51, he explains very clearly and succintly the cycle of operations by which the ammonia compression machine cools the commercial room through the brine circulating system. The report of the "Southwark's" engineer was read to him, and also the copy of the log. He testifies, p. 53:

> "*Q.* The copy of the log which has been produced shows that on July 4, 1894, the day of sailing, and also on the 5th and 6th, the temperature of the incoming brine or the brine flowing into the commercial box to be 40 degrees; please state whether or not that was a proper temperature for the brine at that time?
>
> "*A.* **The temperature is too high altogether.**
>
> "*Q.* What should the temperature have been?
>
> "*A.* The temperature of the brine should have been at that time of the year not less than 12 degrees.
>
> *Q.* "Not less than 12 degrees nor more than how much?
>
> "*A.* Nor more than 18 degrees to 20 degrees.
>
> "*Q.* What does a temperature of 40 degrees for the incoming brine signify, so far as the working of the machinery is concerned?
>
> **"A. It would show that the machine was not doing its work."**

As to the temperature of the commercial room when the meat is received.

All of the witnesses agree that the refrigerating apparatus is usually started, in order to lower the temperature in the commercial room, two or three days before the meat is shipped, so that when the doors of the room are opened to receive the meat, the temperature of the room may not be seriously raised. It is also proved as an undoubted fact by all of the witnesses, that in order to carry fresh meats in safety, the temperature of the commercial room must be below freezing, at the very highest. Respondent does not deny but

that the temperature of the commercial room when the meat was received was 42°.

HUGO B. ROELKER, Record, p. 34, says.

> "It is usual to chill the room down to 25 or 20 degrees in order to have a large amount of cold stored up in the brine, and in the walls and ceilings and floor of the room, and in this way to help the labor which is thrown down upon the machine when the meat is put in."

Upon p. 35 he says that the temperature at which the room is to be maintained in order to keep fresh meat in safety is "30° or 32°."

AUGUST J. ROSSI says, Record, p. 40, that the machine should be operated for 48 hours, "to bring the temperature of the room to 25° or 26°," which would be the proper temperature in order to introduce meat into it.

He proceeds to explain that the temperature of the room when the meat is introduced should be about 10° lower than the danger point, so that when the doors are opened to receive the meat the temperature may not be too seriously raised.

WILFRED H. FLEMING says, Record p. 56:

> "The proper temperature that the beef room should be kept at ranges from 30 to 31 degrees."

In view of this positive and direct testimony from the most competent expert witnesses, that the temperature of the brine as reported by the engineer's log, indicated clearly that the mechanism was not doing its work, and that this temperature was not low enough to reduce the temperature of the commercial room to the point of safety for the carriage of fresh meats, certainly the learned Judge of the District Court was in error when he found, that no sufficient evidence of negligence on the part of the vessel had been produced. Manifestly, it *was* negligence for the "Southwark" to receive

the libellants' meat, when for the two or three days that the machine had been operated *without any meat in the commercial box whatever*, it had been able to reduce the temperature of the brine to 40° only, and the temperature of the commercial room to but 42°, **a condition of affairs shown by the practically uncontradicted testimony, to be unfit for the receipt of the meat.**

ARTHUR NIXON CROSS was also called as a witness by the libellants. He is a marine engineer, and not an expert, but a practical man. When called he was chief engineer of the steamship "Mesaba," and had been chief engineer on four or five other steamships, upon all of which fresh meat was carried across the Atlantic. He says, Record, p. 86, that the refrigerating machinery is usually run from 48 to 50 hours, in order to bring the temperature of the commercial box "down to 22° and that is what they call for loading."

> "*Q.* What is the usual temperature in the room at the time the doors are sealed in summer time?
>
> "*A.* Thirty-four degrees, 36 degrees; 36 degrees in hot weather, after the box has been opened at night.
>
> "*Q.* What temperature do you usually keep the rooms during the voyage?
>
> "*A.* They want it as near 29½ degrees as we can possibly get it; they want an average of 29½ degrees"

He proceeds to explain how there is usually a difference of three to four degrees between the brine going *to* the commercial box, and that which returns *therefrom*. He was then asked (Record, p. 88):

> "*Q.* Was or was not the brine at the temperature of 40 degrees, of a sufficiently low temperature to so cool the room that the meat could be carried with safety?
>
> "*A.* **Certainly not.**"

His testimony is clear and distinct, and is uncontradicted evidence, upon specific facts material, to this case, from a disinterested and practical witness.

He fixes the proper temperature of the brine, Record,

p. 88, at 20°; "but that is when you commence to cool down." * * *

"We bring it down to 15° and 14°, a few days later."

When asked (Record, page 89) what such a high temperature as 40°, for the brine indicated, he says very tersely: "I should say it had never been cooled." * * * "I do not think the refrigerator was working all right. **I am surprised they put the meat in at that opening temperature."**

JOHN YOUNG, another witness for libellants, held a chief engineer's license for the past eight years, and is familiar with refrigerating machinery for fifteen years, and when given the figures shown by the abstract of the "Southwark's" log, (Record, p. 96), says that such a temperature indicated that the machine was **"not working properly."**

"*Q.* What is the usual temperature of the brine that goes in?

"*A.* Ten degrees going in; 40 degrees puts your hold up to 48 degrees.

"*Q.* You think the machine was working in a proper condition for starting out on a transatlantic voyage with a cargo of fresh meat?

"*A.* No; simply because his holds ought to have been further down."

The attention of the court is particularly called to the testimony of Paul, the chief engineer of the "Southwark."

He left the service of the American Line, for some unexplained reason, shortly after this accident occurred, and accepted a position as third engineer of the steamship "Flavian," of the Leyland Line. The libellants have attempted in vain to ascertain why he left the service of the American Line, and although a direct cross-interrogatory upon that point was addressed to him, when his testimony was taken at Liverpool, he evaded answering it. (Record, p. 186.)

In the course of the trial, the respondent's testimony was entirely closed without either this witness or Shinn, the refrigerating engineer, having been called. The libellants then

requested the respondent's counsel to state whether it was his intention to examine either of these witnesses, and was advised that there was no intention to examine them, for the reason then given by counsel, that they "*could throw no additional light upon the case*, and therefore we have not thought it necessary to find and call them as our witnesses." (Record, page 102.)

Two representatives of the libellants called upon Paul, the engineer, in Boston, but he refused to give any information whatever as to the cause of the accident, because he had already given a statement to the steamship company (Record, p. 61 and p. 184). The respondent was again notified to take this testimony, but declined to do so, and it was not until after the libellants' case in *rebuttal* had been closed, and the case was on the list for argument, that a commission was issued to Liverpool, whence Paul and Shinn had removed, and the testimony of the witnesses taken, nearly *six years* after the accident happened.

It may be fairly said that the respondent did everything within its power to avoid producing these witnesses, who had the machinery in charge, and did not produce them until compelled to do so. Even then they were produced at such place and time that the libellants were deprived of all right of oral cross-examination.

When finally examined at Liverpool, Paul made every effort to evade answering direct questions as to the temperature, etc., and his evasion is manifest.

He was asked (29th interrogatory, Record, p. 188):

> "*Q.* State whether the temperature of 40 degrees for the incoming brine on July 4th, indicated whether the refrigerating machinery was working in a proper and efficient manner?"

There could be no misunderstanding as to this question, but instead of eliciting a direct answer, one was given which was manifestly evasive. His answer is:

"Had the weather been cooler, the machinery would have got a lower temperature."

The libellants have certainly shown from all the evidence that when the meat was received neither the *brine* nor the *room* were properly chilled, and as the machinery had been at work the usual time prior to the receipt of the meat, the conclusion seems irresistible that the machinery was not working properly.

II.

That the refrigerating apparatus was not working properly and was in an unfit condition when the meat was received is further shown by the fact that at the same time, and under precisely the same conditions, the ship's smaller machine obtained satisfactory temperatures in the ship's box—that is, the refrigerator in which her own supplies were kept.

It is certainly significant that the respondent was able to carry safely its own meats in its own box, and yet failed under the same circumstances to carry the meat belonging to the shipper.

A comparison of the log entries of the ship's box with those of the commercial box, is alone sufficient to show that the commercial machine was in an unfit working condition for safely carrying fresh meat, before the voyage began.

Those entries are as follows:

Date.	Temperatures.	
	Ship's Storeroom.	Commercial Room.
July 4	36	42
5	38	42
6	38	42
7	35	40
8	34	39
9	32	39
10	30	39
11	30	38
12	28	35
13	28	33
14	28	32

This difference cannot be ascribed to the breakdowns of the machinery.

One effect of those accidents *was to increase the temperature of the ship's provision box*, as the ship's machine was connected with the commercial box as soon as the accident occurred on July 4, and remained connected until July 8th, when the repairs were completed. By this connection the ship's provision box was deprived of a large part of the power of its own machine. Notwithstanding this, however, there was during all this time a much lower temperature in the provision box than in the commercial box.

The difference in the temperatures of the provision box and the commercial room, after the repairs were made, is just as greatly marked.

The "Southwark's" engineers unite in saying that after the repairs were finally completed there was no further trouble with the machine during the voyage. (Rec., pp. 167 and 176.) Yet, during all this time, with identical conditions of water, weather, etc., the ship's machine was maintaining a temperature in the ship's box several degrees below that in the commercial box. Two of the respondent's witnesses (Kilburn, p. 131, and Doran, p. 159) have attempted to ascribe this difference to the sizes of the compartments; but their explanation, if it really is the correct one, instead of relieving the ship, charges her with fault, *because she attempted to carry a perishable cargo in a compartment so large that the machinery could not reduce the temperature in it to the proper degree.*

If the machinery was inadequate for the task assigned to it, the liability of the ship must be admitted.

III.

A series of breakdowns began "at the beginning of the voyage."

The engineer's log, from its first entry, shows an insufficiency of refrigeration in the brine, and a high temperature in the commercial room.

It is evident from his report (Record, p. 207), that the refrigerating machinery was not giving satisfactory results when the vessel started. This report says:—

"On the voyage east the bonnet on the top of the condenser for the refrigerating machine for the commercial box **started to leak badly before we got to Reedy Island, etc.**"

Reedy Island is in the Delaware River below Philadelphia. The report then gives the successive accidents and clearly fixes the liability of the "Southwark" when it records:

"The temperature of the box was 42 degrees when we left Philadelphia, **and I was unable to get below that** (showing clearly his appreciation of the *necessity* of getting below it) **until the 7th, when the temperature gradually decreased to 32 degrees.**"

This statement in the log is somewhat misleading, as the temperature of 32° was not obtained until July 14, the last day of the voyage.

The learned Judge of the District Court states that the joint referred to by the engineer was leaking "within two or three hours *after* leaving port;" but it is not credible that the defect did not exist before that, in view of the unsatisfactory *results* the machine had been producing during the two or three days it had been operated, and in view of the disinterested testimony of E. Platt Stratton (Record, p. 74), the chief engineer, and surveyor of the Record of the American and Foreign Shipping, and consulting engineer of the Board of American Underwriters in New York, who says that he visited the "Southwark" while she was lying at Philadelphia in December, 1894, and interviewed the Chief Engineer of the ship, and the engineer in charge of the refrigerating apparatus, and that the latter said that the accident occurred *before the vessel left the dock.*

"I asked him when this accident occurred, and he said the bonnet split and the accident occurred about two hours and a half *before* the vessel left the dock. He said he reported this to the chief engineer, and he attempted to repair it at that time. And then I asked him if he was positive that it was two hours and a half,

and he said from two hours to two hours and a half *before* the ship left."

But whether this series of mishaps, which were doubtless due to the effort of the engineer to get the temperature down, occurred before the ship left her dock or immediately afterwards, they certainly raise a presumption, to say the least, that the machinery could not have been working properly or in fit condition when the vessel sailed.

IV.

The unfitness of the refrigerating machinery is also shown by the fact that after the breakdowns had been repaired during the voyage, it was unable to properly reduce the temperature in the commercial room, although the conditions then existing were admittedly favorable.

The engineers of the vessel unite in saying that after the repairs were completed by them on July 8th, they had no further trouble.

HAVERFIELD, the second engineer, testified under cross-examination as follows:

"×*Q.* About how many days after you left was the machine in good working order?

"*A.* Probably three or four days after that.

"×*Q And did it work entirely satisfactorily after that time?*

"*A. Yes, sir.*

"×*Q. You had no trouble with it at all?*

"*A. No, sir.*

"×*Q.* You had no complaints after that time to make about the machine having to work too hard or the temperature being too low?

"*A.* Yes, sir; the machine had to be run unusually hard up to the time of the breakdown.

"×*Q. I mean after it was repaired on the 8th, about three or four days after you left port; you had no trouble with the machine at all?*

"*A. No, sir.*" (Rec., 167.)

ALDCRAFT, the third engineer, testified under cross examination (p. 176):

"*Q.* After that (the completion of the repairs) the machine worked satisfactorily?

"*A.* Yes, sir.

"*Q.* You had no trouble with it all?

"*A.* No trouble.

"×*Q. And you had no trouble with the high temperature of the water after that time?*

"*A. No.*

"×*Q. It worked satisfactorily?*

"*A. Yes, sir.*"

PAUL, the chief engineer, says (p. 181):

"After the repairs, it worked all right; it gave no more trouble."

If the conditions after July 8th, when the repairs made by the engineers during the voyage were completed, were entirely favorable to the production of a low temperature in the commercial box, and if there was no further trouble with the machine, it would follow as an inevitable result, that at the proper time after the repairs had been completed, the temperature in the commercial box should have been reduced to at least 30 degrees.

As has been shown heretofore, the refrigerating machinery in efficient condition ought to reduce the usual temperature in the compartment when closed (about forty degrees) to below the freezing point *in about twelve hours*, and consequently, as the log shows that the temperature in the commercial room on July 8th, the day the repairs were completed, was 39 degrees, where it had been maintained by the one compression pump and the ship's machine, then *on the following day, at the latest*, the temperature ought to have been reduced to a point below freezing.

Does the evidence show that this result was accomplished?

It not only fails to show this, but shows that during the

six days intervening, before the termination of the voyage, the temperature was never reduced to the proper degree.

On July 9th, the day following the completion of the repairs, it still stood at 39 degrees, showing that no change had then been made. No change appears on the 10th, when it is still recorded at 39 degrees. On the 11th it was reduced only 1 degree, to 38 degrees. On the following day, the 12th, a further reduction of only 3 degrees was made. On the 13th, 2 degrees and on the 14th, or *last day* of the voyage, the temperature was brought down to 32 degrees only!

These records of the respondent itself, show beyond dispute, that this refrigerating machinery was not working properly and was in such unfit condition, that it could not in six days reduce the temperature below the freezing point, a result which should have been brought about in twelve hours.

The "Southwark's" negligence consisted in receiving libellants' meat, when her commercial box had not been properly reduced in temperature to receive it, and when the machinery was manifestly not producing sufficient results.

Mr. Stratton's opinion of the "Southwark's" conduct, in starting out under such conditions is given (Record, p. 80):

> "I look upon it as exceedingly and decidedly suicidal to have started on that voyage in that condition. I think the engineer was very foolish to start. He was at a point where he could have made a substantial repair. He was jeopardizing the whole contents of that commercial box, and I think if he had known more about refrigerating, he would not have started."

The learned Judge of the District Court says in his opinion, referring to the repairs to the refrigerator plant (Record, p. 209): "The injured parts were *replaced* in Liverpool and since then the machinery has done its work well."

The learned Judge is mistaken in this respect. While the evidence does show that the machine has since done its work, the testimony is uncontradicted, *that it was thor-*

oughly overhauled in Liverpool, after its utter failure to carry the libellants' cargo.

The engineer himself so states, (Record, p. 207):

> "**I put the machine down to be thoroughly overhauled at Liverpool and have it in repair before the ship got to Philadelphia.** I had to get one new compression pump, piston rod and brasses, and one compression pump disk and shaft and one D. P. ceiling cover."

The libellants therefore submit that the respondent was guilty of negligence in receiving this cargo of fresh meat and starting upon a transatlantic voyage in mid-summer, with the refrigerating machinery in so manifestly unfit a condition, that working for a sufficient time and under such conditions that an efficient machine would have reduced the temperature of the brine to at least 20°, it was only able to reduce the brine temperature to 40°, a figure so high, that it was impossible to obtain even an approximation towards the proper degree in the compartment absolutely necessary for the safe carriage of the meat.

SECOND POINT.

The "dressed meat clause" of the bill of lading did not wipe out all warranty of the initial fitness of the ship to receive the cargo, and of the refrigerating machinery to preserve it.

The bill of lading issued for the meat recited that it was "received in apparent good order and condition," and provided that it should be delivered at Liverpool, "in like good order and condition" (Record, p. 21). It also contains, *inter alia*, the following clause, referred to as the "dressed meat clause."

> "It is expressly agreed that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay or damage thereto however arising, including stowage and all risks of breakdown or injury however caused, either to its refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage; also that in case of the meat

becoming, from any cause in the opinion of the master of the vessel, putrid, dangerous or offensive to the passengers or crew, it may be thrown overboard or otherwise disposed of, without liability to the carrier for consequent loss."

In order to determine the effect of this clause it is necessary to consider the duty which would have been imposed upon the ship in its absence.

The "Maori King," 8 Asp. Mar. C., p. 65, L. R. (1895), 2 Q. B. D., 550, is the leading case.

In that case certain carcasses of frozen mutton were shipped on board the steamship at Melbourne, Australia, for carriage to London. Shortly after starting on her voyage the refrigerating machinery broke down, and although it was repaired at Sydney, the cargo had become so damaged in consequence of the breakdown, that it had to be sold immediately at Sydney at a loss.

The following exceptions in the bill of lading were relied upon as relieving the ship from liability :

> "Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from the failure or breakdown of machinery, insulation or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officer, engineer, crew, or other persons in the service of the owners nor for any cause whatsoever."

The case was first heard before MATHEW, *J.*, who held that *there was a warranty of the fitness of the refrigerating machinery for the voyage*, from which there was no exception by the provisions of the bill of lading.

This decision was affirmed upon appeal, by ESHER, M. R., KAY and SMITH.

LORD ESHER said in delivering his opinion :

> "I agree with my brother MATHEW in his holding that there was an implied term in the bill of lading *that the refrigerating machinery at the time of shipment was*

fit to carry frozen meat to Europe on an ordinary voyage made under ordinary circumstances."

The United States Circuit Court of Appeals for the Second Circuit approved this decision, in the *Prussia*, 93 Fed., 837. A libel had been filed against the *Prussia* to recover for injury to fresh meat through an accident to refrigerating machinery. It was held that the steamship was not liable, as the breakdown was due to a latent defect.

WALLACE, *J.*, says in the opinion:

> "It is the duty of a carrier by water, when he offers a vessel for freight, to see that she is in suitable condition to transport her cargo in safety; and he impliedly warrants that this duty has been fulfilled. And when he proposes to transport across the Atlantic a cargo of frozen meat, we agree, as adjudged in the *Maori King* (1895, 2 Q. B. 550 and *Queensland National Bank* v. *Peninsula and Oriental Steam Navigation Co.* (1898), 1 Q. B., 567, *that he must be taken to stipulate with the shipper, that the vessel is provided with suitable apparatus of requisite efficiency to enable him to deliver it in proper order.*"

It will be observed, therefore, that in the absence of a special contract, the warranty of the refrigerating machinery is identical with, and probably included in, the warranty of the seaworthiness of the ship itself.

In delivering the opinion in the *Silvia*, 171 U. S., 462, Mr. Justice GRAY says:

> "The test of seaworthiness *is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.* This is the commonly accepted definition of seaworthiness.'

Whether the warranty of seaworthiness covers the refrigerating machinery is unimportant, as it must be admitted that in the *absence* of a special contract, the warranty in both cases is the same, and covers even latent defects.

The Caledonia, 157 U. S. 124.
The Maori King, 2 Q. B. D. 550.
The Prussia, 93 Fed. Rep. 837.

What, then, was the effect of the "dressed meat clause" of the bill of lading upon the underlying warranty of the fitness of the machinery?

The clause is undoubtedly invalid in its broad terms, and the Courts below have so held. It is in violation of sections 1 and 2 of the Harter Act (27 Stat., 445) and should therefore be excluded entirely. It is in direct conflict with a statutory prohibition, and should be held void *in toto*. To reform it, and give validity to part of it, is making a contract for the parties which they have not made themselves.

Assuming, however, for the sake of argument, that it is a valid limitation, to the extent allowed by law, instead of being entirely invalid, what is its effect?

The Circuit Court of Appeals for the Third Circuit has held in effect that the parties having entered into this agreement, *there was no implied warranty of the fitness of the machinery at all, and that the ship was liable only upon proof of negligence.*

It is said in the opinion of the District Court, which the Court of Appeals adopts, (Record, 21*):

> "The warranty that a ship in this business is fit at the beginning of a voyage to carry dressed meat safely —which was decided to be implied where the bill of lading is silent (the *Maori King*, (1895), 2 Q. B. 550) cannot be implied if the parties have chosen to contract otherwise; and such a contract is clearly expressed by the language now being considered. The burden of proof, therefore, is not upon the carrier, but upon the shipper, and *there must be sufficient evidence of the carrier's negligence before the shipper can be allowed to recover.*"

In the consideration of this clause, it is well to remember the proper rule of construction which is applicable to all clauses which limit the general duty of all shipowners. In the *Carib Prince*, 170 U. S., at 659, Mr. Justice WHITE says:

> "The rule thus announced in *The Caledonia* but expressed the doctrine stated by Lord SELBORNE in *Steele v. State Line S. S. Co.*, L. R. 3 App. Cases, 72,

that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive a construction *not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken.*"

It is submitted that the findings of both of the courts below, that the "Southwark" was liable only upon proof of negligence, is directly opposed to the provisions of the Act of February, 13, 1893, 27 Stat., 455, c. 105, entitled "An act relating to the navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property."

That act provides:

"SEC. 2. *That it shall not be lawful* for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, *to insert in any bill of lading* or shipping document *any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel,* and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

"SEC. 3. *That if the owner of any vessel* transporting merchandise or property to or from any port in the United States of America *shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied,* neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or

for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Applying the law as stated in these two sections, it is clear that the "dressed meat clause," if not invalid entirely, certainly falls far short of wiping out the warranty of initial fitness, and rendering the ship liable only upon proof of negligence by the owner of the cargo, as held in the courts below. The act simply permits the ship owner to relieve himself (so far as concerns conditions at the commencement of the voyage) from liability for loss resulting from *latent defects*, upon proof by him that he has exercised due diligence to make the vessel and its equipment fit. There still remains a warranty that the ship owner shall exercise due diligence to create initial fitness. As this court said in *International Navigation Company* v. *Farr & Bailey Mfg. Co.*, 181 U. S., 218, the burden is upon the ship owner to show that he has used the required degree of diligence. It would be hardly possible for the owner of cargo to prove that the ship owner did *not* exercise due diligence.

THIRD POINT.

The Harter Act applies to bills of lading issued for fresh meat.

There is no discussion of the law relating to this question, in either the opinion of the District Court or of the Circuit Court of Appeals. There is a mere statement that the ship was responsible, under the "dressed meat clause," only upon proof of negligence.

In view of the absence of a discussion of the law, it is impossible to state the grounds upon which this finding is based, but as the provisions of the Harter Act are clear, it may be that the courts below were of the opinion that the

Harter Act was not applicable to a contract for the carriage of fresh meat.

That view seems to have been taken by Judge THOMAS of the Eastern District of New York, in the *Prussia*, 88 Fed., 531. He deemed the furnishing of the cold storage compartments, for the carriage of fresh meat, a mere collateral undertaking, independent of the obligation of a common carrier, and therefore the rights and duties of the parties were not governed by the law applicable to carriers, but were to be determined according to the law which would apply to the business of cold storage on land.

He says :

> " This contract is quite collateral to the obligation of a common carrier, and hence may impose such full or qualified obligations upon the bailee as the parties to it determine."

That view, however, was not accepted by the Circuit Court of Appeals, when that case was heard on appeal. (93 Fed. 837). It is there said :

> " We conclude that the damage sued for arose in consequence of a latent defect in the refrigerating machinery, that due diligence was exercised by the owner of the steamship to provide suitable and perfect refrigerating machinery, and that by the terms of the Harter Act, as well as irrespective of that act, it is lawful for a vessel owner, who has exercised due diligence, in that behalf, to stipulate for exemption from liability arising from such a defect."

The conclusion of the Circuit Court of Appeals in the present case is the only guide to the reasons upon which the decision is based, and in view of the provisions of the Harter Act, it must be assumed that the Court below, like the District Court in the *Prussia* case, was of the opinion that the Harter Act did not apply to contracts for the carriage of fresh meat.

It is unnecessary to point out the far reaching effect of such a decision. The equipment of modern ocean steam-

ships has developed according to the necessities of modern commerce, and much of the cargo now carried upon trans-Atlantic steamers is of such a character that special facilities and appliances, in addition to those ordinarily provided by carriers, are necessary for safe transportation. Two instances will suffice to show the extent of this traffic. It has been but a short time since that the newspapers announced the shipment of gold bullion of a value of $7,500,000 on the steamship *Kron Prinz Wilhelm*, and thousands of cattle are carried from the Atlantic seaports weekly. For the safe carriage of the bullion a special bullion room is necessary and for the carriage of live cattle special fittings are required.

There never has been any question as to the duty of steamships in these cases. The law has always been understood to be that there is a warranty of the initial fitness of the vessel *in all respects* to carry the cargo received.

In *Queensland National Bank v. Peninsular and Oriental Steam Navigation Co.* (1898) 567, certain bullion was shipped upon the steamship *Oceana*, and it was held that there was an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves.

In Tattersall *v.* National Steamship Co., L. R. 12, C. B. Div., 297, the same rule was applied to a contract to carry cattle, and it was held that there was a warranty of the fit condition of the ship to carry them. The cattle became affected by a foot and mouth disease, which was occasioned by the negligence of the ship's servants in not cleansing the ship before receiving the cattle on board, and it was held that the ship owners were liable for the loss, although the bill of lading provided that the steamship company should not be "in any wise responsible either for the escape of the cattle from the steamer, or for accidents, disease or mortality," etc.

If the law, as stated by the courts below, is correct, it applies not only to shipments of fresh meat, but to bullion, cattle, and every commodity whatever whose safe carriage demands any special appliances not found in the sailing ships of a century ago. Many other kinds of cargo need special

facilities. Wheat in bulk must be protected by dunnage and bulkheads to prevent its injury and its shifting. Oil and molasses, in bulk, require special precautions and accommodations. Many cargoes are perishable by reason of their liability to absorb fumes or smells, and require holds absolutely clean, and free from other cargo.

Traffic of this character was of a large volume at the time of the enactment of the Harter Act in 1893, and it cannot be presumed that Congress legislated in ignorance of it. It must be assumed that the intention of Congress was to govern the obligations of carriers of all kinds of property at sea, and that it legislated with reference to all of the provisions of the contract of carriage and not to a part of it only.

Otherwise, it must be held that the obligation of the carrier may be determined by the character of the property; that as to coal stowed in the hold, the carrier would be compelled, in case of loss, to prove that he had exercised due diligence to make the ship in all respects seaworthy, but as to bullion, carried in the bullion room, or fresh meat stowed in the meat compartment, the unfortunate cargo owner, who sustained a loss, would be compelled to prove affirmatively that the ship owner was guilty of negligence.

FOURTH POINT.

The Burden of Proof.

It is submitted that not only have the courts below erred as to the proper construction of the "dressed meat clause," but, that they have fallen into another error which is equally dangerous in its effect.

In delivering the opinion in *International Navigation Co.* v. *Farr & Baily Manufacturing Company*, 181 U. S., 218, Mr. Chief Justice FULLER, says:

> "We repeat, that even if the loss occurred through the fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exer-

cised, and *it is for the owner to establish the existence of one or of the other of these conditions.*"

It is asserted in the opinions of the courts below, that under the "dressed meat clause" the ship is responsible for negligence only, *and that the burden of proof is upon the owner of the cargo to show negligence.* Such a rule of law would practically nullify the provisions of the Harter Act. The information is always in the possession of the carrier.

That rule would permit the carrier to escape liability in every instance, by following the course of the ship owner here, namely, giving no explanation whatever as to how the loss happened.

In the case of the *Prussia*, 93 Fed. Rep., 837, the steamship company affirmatively established that the accident was due to a latent defect, and that it had used due diligence. In the present case there is not a word of testimony to show that the unfit condition of the machinery was caused by a latent defect.

There has been no attempt to explain the unfitness of the machinery at the time the cargo was received on board. The engineers being examined abroad under a commission (although there was ample opportunity to examine them in this country), evaded all questions on that point, and they also testified that they did not even know the cause of the accidents after the voyage commenced.

The burden of proof under the circumstances of the case was shifted to respondents.

The libellants have shown the arrival of the meat in a rotten condition. It was so "mouldy and slimy" that something quite out of the ordinary must have occurred.

They have shown that when the meat was put in the commercial box, the temperature of the brine was not low enough to chill the room; that the machine broke down, immediately after leaving port, if not before, and that though it was repaired it did not lower the temperature even then in

the required manner; that it was completely *overhauled* at Liverpool after the ship's arrival and new parts supplied, and that then it did work properly.

Can it be doubted but that it needed, before the accidents, the very overhauling it got afterwards, and that if it had been thus overhauled libellants' meat would not have rotted? Besides, the facts are all peculiarly with the knowledge of respondent alone, and its officers and engineers. The libellants' efforts to bring the facts to light, and the delay and difficulty then encountered, show that the facts are practically accessible to respondent alone. The ship, the machinery, the engineers, and the meat, were all under respondent's control and in respondent's possession when the damage was sustained. Is it unreasonable to shift upon respondent the burden of proof after the libellants have proved what they have.

FIFTH POINT.

Inspection.

In conclusion, the attention of the court is directed to a point of much practical importance, that is, the finding of the courts below as to what constitutes an inspection. It is said in the opinion of the District Court (Rec. p. 209):

> "Shortly before the voyage in question, it (the refrigerating machinery) had been inspected by a competent official, and was apparently in good order."

We are unable to state whether the court meant by this that there had been an exercise of "due diligence," as required by the Harter Act, or not, as the question is not referred to in the opinion.

Now it is true, that what constitutes a proper "inspection" is a mixed question of law and fact, like that which is sufficient to constitute negligence. But as certain acts are so clear, as to permit a court to say as a matter of law, that they constitute negligence, the facts in certain cases may be

so clear as to permit a court to say as a matter of law, whether they show a proper inspection.

The law is thus stated by Mr. Chief Justice FULLER, when he said in the *Edwin I. Morrison*, 153 U. S., at 215:

> "In relying upon *external appearances in place of known tests*, the respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement."

And it is submitted that in this case, as a matter of law, it ought to be said that no proper inspection was made.

The alleged inspection was made by one McKernan, superintendent of the repair shops of the International Company, and *according to his own testimony it was not his duty to make an inspection*, but that duty was imposed upon Mr. Doran, superintending engineer, or his assistant, neither of whom testify as to any examination. McKernan was nothing but a *seagoing* engineer, not a refrigerator engineer, but a marine engineer, who had given up going to sea.

The testimony upon which the alleged inspection is based, is as follows:

> "*Q.* How long before the sailing had you inspected it?
>
> *A.* Do you mean from the outside?
>
> *Q.* Yes, sir.
>
> *A.* About half an hour before she sailed.
>
> *Q.* Was there any leak in the bonnet?
>
> *A.* No, sir.
>
> *Q.* Would you have known or could you have known it if it had been?
>
> *A.* Yes, sir.
>
> *Q.* How?
>
> *A.* By the smell.
>
> *Q.* Was there anything apparently wrong with the pump or piston?
>
> *A.* Nothing at all." (Record, p. 137.)

* * * * * * *

"*Q.* What time did the 'Southwark' sail on that morning; do you remember?

A. I could not tell you the exact time; it was in the neighborhood of eleven o'clock.

Q. What time were you in the refrigerating room?

A. About half an hour previous to that time.

Q. How do you fix the time?

A. Do you mean eleven o'clock?

Q. I mean the time you were in the refrigerating room.

A. Because I was there looking after it. I left the engine room, went around everything, the boilers and engines, and came up on the top platform where the refrigerators are; *went in and looked, as I always did, and always do yet; I looked in there.*" (Record, p. 136.)

That is, the witness *looked or smelt* to find if there was an actual break, not whether there was any *liability* to break, which is the necessary object of the inspection of any machine.

Upon (Record, p. 123) the history of this machine is shown. It was not a new machine, but upon cross-examination of Kilburn, who had sold the machine to the American Line, it developed that *the machine was an old one*, and transferred in England from "either the 'Alaska' or the 'Spain.'" The witness goes on to explain that the machine was the old kind formerly made here, not the later pattern now made by his company.

The testimony of McKernan, the alleged inspector, was so unsatisfactory that he was recalled by the respondent itself to elaborate his "inspection." He fully explains all of his *duties*. He was superintendent of the repair shop, and according to his own testimony, if the duty of inspeection was imposed on any one, Mr. Doran, or Mr. Clark, his assistant, had that duty. He nowhere especially says what his inspection consisted in. He merely seems to have looked to see if the machinery was working. He gives no evidence of any overhauling of the device, or careful examination of it at this time, and besides, as has been said, he was not a refrigerator

engineer in any sense, and therefore not competent to make the inspection he is alleged to have made.

This is all the testimony upon which the allegation of an inspection is based. At the utmost, it shows only mere ordinary observation of machinery in motion. In fact, the witness' evidence practically shows no more than that the bonnet of the condenser was not then leaking, because no pungent odor of escaping ammonia gas was noticeable. Unquestionably the engine, the motive power, was working, and the witness saw that alone, but he did not give the slightest attention to the refrigerating machinery or discover that for some reason it was not then and had not been producing cold. The temperature of the meat compartment was then 42° and the temperature of the brine instead of being 20° was about 40°. He did not know or discover these facts because it was not his duty to make any examination of the manner in which the machinery was working.

There is not the slightest pretence that any other person made an inspection of the machinery or compartment.

To sustain the finding of the court below that an inspection was made, it is necessary to hold that a *mere observation of a machine in motion* was a due and proper inspection, although the pressures and temperatures then indicated that the machine was working in such an inefficient manner as to immediately imperil the safety of the cargo.

According to the rule laid down, this mere observation is not an inspection and does not relieve the carrier from liability.

The Aggi, 93 Fed., 484.
The Phœnicia, 90 Fed., 116.

Besides the *results* were manifest. The machine was *not* producing cold, and it is certainly no defence to allege that the "inspector" failed to observe what was plainly apparent.

There was no evidence of an examination of the various temperatures and pressures by this witness. If he had

made an examination of them, he undoubtedly would have discovered that which the log entries show, viz., that the machinery was not working properly, that it was not producing cold, and that the temperature of the air in the compartment and of the brine—the cooling agent—was so excessive as to endanger the meat at once in the summer weather then prevailing.

The sufficiency of the alleged inspection must be determined by the result, and if—as appears—the witness did not so examine existing conditions, as to discover the excessive temperature and unfitness of the machinery, it is indisputable that his examination was not in any sense an "inspection."

The difference between the degree of diligence to be exercised, under the ruling of the court below, and that required by other courts, is well illustrated by the decision of Judge BROWN in the *Phœnicia*, 90 Fed., 117. Cargo was damaged by seawater entering through a leaky port. It appears that at Hamburg the outer blind was tried to see if it would go in or out, the glass cover and inner cover were screwed up tight. It was held that this was not a proper inspection, as it would not show a leak—and that having failed to apply either the "chalk" or "water" tests, which would have showed the leaky condition of the port, the ship was liable.

The practical test of the sufficiency of the inspection appears, under the decisions of this court, to be the character of the defect. If latent, the inspection is presumed to be sufficient, but if not latent, it ought to be revealed by a proper examination.

THE DEFENSE.

A word should be said about the respondent's defence. The answer itself shows want of merit.

1. It alleges that "the weather was extraordinarily hot the temperature being considerably over 80 degrees," and then from this *extraordinary* temperature of over eighty degrees for July weather, it is soberly argued that such tremendous labor was cast upon the refrigerating apparatus, that "the *extraordinary* temperature of over 80 degrees," was an act of God, and the machinery therefore broke down under the strain.

The mere statement of such a defence shows its utter groundlessness. It needs no argument to establish the fact, that 80 degrees, instead of being extraordinarily hot for Philadelphia weather in July, would be extraordinarily cool if it did not rise beyond that point of ordinary summer heat.

The respondent has further sought to escape liability, by alleging that the temperature of the water of the Delaware was raised by this "extraordinary temperature of over 80 degrees," as high as 73 degrees, and thereby more work was put upon the condensing apparatus which condensed the ammonia after its compression, but the testimony of libellants' witnesses is so clear and conclusive upon the subject that this defense was practically abandoned in the court below, and is not even referred to in the opinion of the learned Judge.

Hugo B. Roelker (Record, p. 73); August J. Rossi (Record, p. 37); Wilfred H. Fleming (Record, p. 53); Arthur Nixon Cross (Record, p. 85); John Young (Record, p. 96), a total of five witnesses, all say that the temperature of 73 degrees for the water in which the vessel is lying "is a very frequent and entirely usual one," and not at all high, and that every refrigerating machine is built to work under just such conditions.

The temperature of the Gulf Stream it is said "frequently runs to 80 degrees and more," and yet the transportation of fresh meats along it or through it, is a common occurrence. In the Gulf of Mexico, the water rises, it is said to 85

degrees, and in the Red Sea, "it goes as high as 90 degrees," and refrigerating machines are regularly used on vessels passing through these waters.

2. The only defense, which the respondent pressed at the argument in the courts below, was that the clause in the bill of lading, above referred to, exempted it from liability and cast the burden of proof upon the libellants. It cannot be denied, that if the "Southwark" was negligent, that is, if the appliances for the carriage and preservation of libellants' meat, were not fit for the purpose for which they were to be used, the clause in question does not exempt her from liability, *because such receipt would be itself an act of negligence*, and this clause cannot possibly exempt her from negligence.

Even assuming that the burden of proving negligence is cast upon the libellants, yet it is urged they have abundantly met that burden, and clearly proved the negligence of the "Southwark" in receiving their meat, when the commercial room and its refrigerating appartus **were not in condition for such receipt,** and have, at the very least, proved such an extraordinary and unusual condition of the refrigerating machine and commercial room, as to meet the primary burden of proof claimed to be cast by the bill of lading upon the libellants, and made it then incumbent upon the respondent, to show by affirmative evidence, that the machine was in fact in fit and proper order and producing satisfactory results when the libellants' meat was received.

The respondent has certainly not met its obligations in the premises, when it produces such testimony as this record shows, *that respondent does not know the cause of the breakdowns.*

GILBERT PAUL, the "Southwark's" engineer, whose testimony was not taken until after he had estabblished himself in Liverpool, and could be reached only through a commission, says p. 181:

> **"I can give no confident explanation of the breakdown."**

JOHN YOUNG, the assistant engineer, says *the same thing in the same words* (Record, p. 194):

> "I can give no explanation of the breakdown of the machinery;"

and when both of these witnesses had submitted to them the cross-interrogatories, one of which was directed towards the alleged high temperature of the incoming water, they both say exactly *the same thing in the same words.*

PAUL says (Record, p. 188):

> "I have never said that it was caused by the high temperature of incoming water."

SHINN (Record, p. 199):

> "I have never stated that the breakdown was caused by the hot temperature of the incoming water."

3. Respondent further contended that the machine was "inspected" before the "Southwark" left port, but in answer to this defense, it is submitted, first, that notwithstanding the alleged inspection, *the fact remains, that the temperature of the brine and the temperature of the commercial room, were unusually and grossly in excess of what they should have been to make it safe to receive and carry the meat;* and secondly, that the alleged inspection, as shown by the testimony of the alleged inspector (Record, p. 136), was of the most perfunctory character. The inspection did not inspect.

4. Another defence is that the the breakdowns were due to a cause not known to the respondents.

The libellants allege that the inefficiency of the machinery was manifest at the time the cargo was received and at the time the ship sailed. If this contention is correct, then the cause of the breakdowns is not material. The libellants refer to it as additional evidence that the machinery was in unfit condition at the time the ship left the dock.

The respondent called five or six witnesses who testified that the breakdowns were due to the high temperature of the

water used in the condenser, but the chief engineer and refrigerating engineer *deny* this and say that they do not know the cause of the trouble. (Record, p. 188 and 189.)

In view of the fact that none of the witnesses have ever referred to any latent defect, this testimony is certainly immaterial. If a latent defect had been the cause of the breakdowns, it would have been immediately disclosed. None having been disclosed, it must be assumed that none existed.

None of the witnesses called by the respondent are able to give any explanation of the breakdowns of the machinery. Their testimony is well epitomised by Aldcraft, p. 173, who says, when asked if he can form any idea why the leak occurred and the pump broke down, says:

> "The only thing I can refer that to is on account of the excessive speed we put the machinery at to keep the temperature in the box."
>
> *Q.* What was that due to?
>
> *A.* The sea water being warm. It was warm, very warm."

And yet it is a fact that this extraordinary warmth was but 73 degrees.

It is respectfully submitted that the libellants have shown by uncontradicted evidence, that the temperature of the brine and of the commercial room was unusually high and in an untfit and improper condition **when libellants' meat was received**, and that these facts demonstrate conclusively (the machine having been run for three days, in order to lower the temperature in the room) that the machine was in an unfit condition and not in proper working order. The respondent was put upon notice that the machine was not doing its duty, and his receipt of libellants' meat was negligence for which it should pay, and not the libellants, who are in no way chargeable with fault.

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